

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos.: 10-O-02978-PEM
)	(10-O-05810)
DAVID FRANKLIN BROWN)	
)	DECISION
Member No. 172130)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction and Pertinent Procedural History

This default matter was submitted for decision on January 24, 2011. At the time of submission, the State Bar of California (“State Bar”) was represented in this matter by Deputy Trial Counsel Maria J. Oropeza. Respondent David Franklin Brown (“respondent”) failed to participate in this matter either in-person or through counsel.

The State Bar filed a Notice of Disciplinary Charges (“NDC”) against respondent on October 19, 2010. That same day, a copy of the NDC was properly served on respondent in the manner set forth in rule 60 of the Former Rules of Procedure of the State Bar of California (“Former Rules of Procedure”).¹

¹ Effective January 1, 2011, the Rules of Procedure of the State Bar of California were amended. Based on the court’s determination that injustice would otherwise result, the court applied the Former Rules of Procedure in this proceeding.

As respondent did not file a response to the NDC, on December 8, 2010, the State Bar filed and properly served on respondent a motion for the entry of respondent's default.² When respondent failed to file a written response within ten days after service of the motion for the entry of his default, the court, on January 3, 2011, filed an order of entry of default and involuntary inactive enrollment.³ A copy of said order was properly served on respondent at his membership records address; however, it was subsequently returned to the court by the U.S. Postal Service as undeliverable. Thereafter, the State Bar waived a hearing in this matter, and it was submitted for decision on January 24, 2011.

II. Findings of Fact & Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Former Rules Proc. of State Bar, rule 200(d)(1)(A).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 2, 1994, and has been a member of the State Bar of California at all times since that date.

B. Counts 1-7 - The Lawrence Matter (Case No. 10-O-02978)

1. Findings of Fact

On or about April 6, 2009, Douglas Lawrence ("Lawrence") employed respondent to collect \$150,000 that had been awarded to him as part of a dissolution settlement. The settlement required Lawrence's former spouse to sell or refinance a piece of real property in order to obtain the necessary funds. Lawrence paid respondent \$2,500 for these legal services.

² The State Bar also requested that the court take judicial notice of respondent's official membership records address history. The court grants this request.

³ Respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (e) was effective three days after the service of this order by mail.

Thereafter and continuing until his employment was terminated, respondent performed no services for Lawrence and made no attempt to recover funds for Lawrence from the former spouse.

Shortly after employment, respondent told Lawrence that respondent had commenced foreclosure proceedings, but this was not true. When respondent told Lawrence that respondent had commenced foreclosure proceedings, respondent knew that this was not true.

Shortly after employment, Lawrence visited respondent's offices and signed a substitution of counsel. Respondent received this document but did not file it with the court and made no appearance in the case.

Thereafter, Lawrence left numerous telephone messages for respondent. Respondent received these messages but did not respond in any way. Respondent: (1) permanently absented himself from his law offices without giving notice to Lawrence; (2) did not provide Lawrence with a forwarding address; and (3) made no arrangement for others at the location at which respondent formerly maintained his office to provide a forwarding address for respondent. As a result, when Lawrence visited respondent's law offices, the persons working there declined to provide Lawrence with information as to respondent's whereabouts.

On or about November 12, 2009, Lawrence mailed a certified letter to respondent's law offices which, at that time, was still the location listed as respondent's official address with the State Bar. The letter was properly addressed, with postage fully prepaid, and placed in the United States mail. The letter was not returned as undeliverable, but Lawrence did not receive back the return receipt card from the postal authorities. In the letter, Lawrence demanded a refund and information as to the status of his case. Respondent received this letter and did not respond to it.

In or about March 2010, with no assistance from respondent, Lawrence reached a settlement with his former spouse and thereby resolved the issue for which respondent was employed.

As of October 19, 2010, respondent has not refunded any part of the \$2,500 fee he received from Lawrence.⁴ Respondent never earned any part of the \$2,500 fee. As of October 19, 2010, respondent had not provided Lawrence with an accounting as to the \$2,500 in fees respondent received.⁵

Since March 1998 and continuing until the present, respondent has listed his address with the State Bar as 719 14th St., Modesto, CA 95354. Since at least late 2009, respondent has not maintained his offices at said address and has not used said address for the State Bar purposes. Respondent abandoned said address by late 2009.

The State Bar conducted an investigation into the Lawrence matter. Despite respondent's failure to update his address of record, the State Bar investigator was able to contact respondent three times, as follows:

First, on or about August 4, 2010, the State Bar investigator left a voicemail message for respondent. In the message, the investigator identified herself as a State Bar investigator and requested that respondent return the call. Respondent received this voicemail message but did not respond.

Second, on or about August 4, 2010, the State Bar investigator sent respondent an email requesting that respondent contact the investigator. Respondent received the email shortly thereafter, but did not respond.

⁴ The NDC was filed on October 19, 2010. There is no indication in the record that respondent has since refunded any part of the \$2,500 fee he received from Lawrence.

⁵ There is no indication in the record that respondent has since provided Lawrence with an accounting as to the \$2,500 in fees respondent received.

Third, on or about August 16, 2010, a State Bar investigator mailed a letter to respondent at his residence in the State of Idaho. The letter asked respondent to respond to previous State Bar letters of inquiry, copies of which were enclosed, and asked respondent to respond to the allegation that he had failed to properly update his State Bar membership address. The State Bar had sent these prior letters of inquiry to respondent's address of record with the State Bar but had received no response. The previous letters of inquiry requested a written response to the Lawrence matter allegations and requested copies of specified documentation pertinent to the investigation. Respondent received the package containing the August 16, 2010 letter and enclosures shortly after it was mailed, but failed to respond to it.

Respondent failed to cooperate with and failed to participate in the State Bar investigation in any way.

2. Conclusions of Law

a. Count 1: Rules of Professional Conduct of the State Bar of California, Rule 3-110(A)⁶ [Failure to Perform with Competence]

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence. By failing to perform any legal services for Lawrence, respondent recklessly and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

b. Count 2: Business and Professions Code Section 6068, Subdivision (m)⁷ [Failure to Communicate]

Section 6068, subdivision (m) provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal

⁶ All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

⁷ All further references to section(s) are to the Business and Professions Code, unless otherwise stated.

services. By failing to respond to Lawrence's numerous telephone messages, respondent failed to respond promptly to reasonable status inquiries of a client, in willful violation of section 6068, subdivision (m). And by absenting himself from his law office and by failing to provide Lawrence with an address at which he could be reached, respondent failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services, in willful violation of section 6068, subdivision (m).

c. Count 3: Rule 3-700(D)(2) [Failure to Refund Unearned Fee]

Rule 3-700(D)(2) requires an attorney whose employment has been terminated to promptly refund any part of a fee paid in advance that has not been earned. By failing to refund any part of the \$2,500 fee paid by Lawrence, respondent failed to refund promptly fees paid in advance that had not been earned, in willful violation of rule 3-700(D)(2).

d. Count 4: Rule 4-100(B)(3) [Failure to Render Accounts]

Rule 4-100(B)(3) requires that an attorney maintain complete records and render appropriate accounts of all client funds in the attorney's possession. By failing to account for the funds he received, respondent failed to render appropriate accounts to a client regarding all funds coming into respondent's possession, in willful violation of rule 4-100(B)(3).

e. Count 5: Section 6068, Subdivision (j) [Failure to Update Membership Address]

Section 6068, subdivision (j) provides that it is the duty of an attorney to comply with the requirements of section 6002.1. Section 6002.1 requires, in part, that members maintain, on the official membership records of the State Bar, their current office address;⁵ and in the event that a member's address changes, the member must notify the membership records office of the State

⁵ If the member does not maintain an office, then they are required to list the address to be used for State Bar purposes.

Bar within 30 days. By failing to update his address with the State Bar, respondent willfully violated section 6068, subdivision (j).

f. Count 6: Section 6106 [Moral Turpitude - Misrepresentation]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. By falsely telling Lawrence that respondent had commenced foreclosure proceedings, respondent willfully committed an act involving moral turpitude, dishonesty and corruption in violation of section 6106.

g. Count 7: Section 6068, Subdivision (i) [Failure to Cooperate]

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. By failing to respond to the State Bar investigator's August 4, 2010 email and voicemail, and August 16, 2010 letter of inquiry, respondent failed to cooperate and participate in a disciplinary investigation pending against him, in willful violation of section 6068, subdivision (i).

C. Counts 8-11 - The Cambria Ventures Matter (Case No. 10-O-05810)

1. Findings of Fact

On or about August 3, 2009, respondent filed a lawsuit on behalf of corporate plaintiffs entitled *Cambria Ventures, Inc. et al. v. Dual Arch International Inc., et al.*, case number 643968, Stanislaus County Superior Court, to contest the validity of foreclosure proceedings commenced by defendants concerning real property owned by respondent.⁸

Respondent's final action in the case occurred on April 30, 2010, when he sent a settlement proposal to the defendants, which was rejected. Thereafter, respondent abandoned his

⁸ No other reference is made to respondent's ownership interest in this property. It is unclear to the court whether respondent actually owned the subject real property or whether this was a typographical error. Regardless, this fact has little bearing on the court's decision.

law practice and moved out of the State of California without providing a forwarding address to his client.

Respondent failed to appear at the May 3, 2010 mandatory settlement conference and failed to file a settlement conference statement. On that same date, a representative of respondent's client telephoned respondent. During the telephone call, respondent stated that he would not perform further work in the case and that he would not make a formal motion to withdraw from the matter.

At all times mentioned, the rules governing such lawsuits in the superior courts of California required that, in order to withdraw from a case, an attorney was required either to obtain court permission or to obtain the client's written consent. (Code of Civ. Proc. § 284.)

Respondent abandoned this case without making a motion to withdraw, without court permission for withdrawal, and without filing a substitution of counsel pursuant to Code of Civil Procedure section 284.

Respondent's employment effectively terminated when he abandoned the case and notified his client's representative that he was abandoning the case. At the time respondent abandoned the case, the deposition of one of his client's corporate officers was scheduled for May 10, 2010. Even though respondent knew about the scheduled deposition, respondent failed to appear at the deposition and failed to notify either his client or the deponent about the deposition.

At the time respondent abandoned the case, the trial was scheduled for June 2, 2010, and respondent knew about the scheduled trial date. Respondent had not served all of the party defendants named in the lawsuit with a summons, even though he knew that the participation of each of the named defendants was necessary for an appropriate outcome for his client.

When he abandoned the case, respondent took no steps to: (1) protect his client; (2) to assure that the client would be represented by counsel at the settlement conference and trial; or (3) to seek a continuance of the trial date so that the client could obtain new counsel.

The State Bar conducted an investigation into the Cambria Ventures matter. Despite respondent's failure to update his address of record, the State Bar investigator was able to contact respondent three times, as follows:

First, on or about August 4, 2010, the State Bar investigator left a voicemail message for respondent. In the message the investigator identified herself as a State Bar investigator and requested that respondent return the call. Respondent received this voicemail message but did not respond.

Second, on or about August 4, 2010, the State Bar investigator sent respondent an email requesting that respondent contact the investigator. Respondent received the email shortly thereafter, but did not respond.

Third, on or about August 16, 2010, a State Bar investigator mailed a letter to respondent at his residence in the State of Idaho, requesting a written response to the allegations generally set forth in the Cambria Ventures matter, and requested copies of specified documentation pertinent to the investigation. Respondent received the letter shortly after it was mailed, but failed to respond to it. Respondent failed to cooperate with and failed to participate in the State Bar investigation in any way.

2. Conclusions of Law

a. Count 8: Rule 3-700(A)(1) [Failure to Obtain Court Permission to Withdraw]

Rule 3-700(A)(1) states that if permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission. By abandoning the Cambria Ventures matter and not

obtaining court permission for withdrawal, respondent failed to obtain the permission of a tribunal before withdrawing from employment, in willful violation of rule 3-700(A)(1).

b. Count 9: Rule 3-700(A)(2) [Improper Withdrawal]

Rule 3-700(A)(2) provides that an attorney may not withdraw from employment until taking reasonable steps to avoid foreseeable prejudice to the client's rights. By abandoning the Cambria Ventures matter without: (1) taking steps to continue the trial; (2) serving all of the necessary parties with a summons; (3) making appropriate arrangements for the deposition; and (4) providing appropriate representation at the settlement conference, respondent failed to take reasonable steps to avoid reasonably foreseeable prejudice to his client, in willful violation of rule 3-700(A)(2).

c. Count 10: Rule 3-110(A) [Failure to Perform with Competence]

By failing to serve all necessary defendants with process and by abandoning the case without: (1) taking steps to continue the trial; (2) serving all of the necessary parties with a summons; (3) making appropriate arrangements for the deposition; and (4) providing appropriate representation at the settlement conference, respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

The misconduct in Count Ten, however, is based on the same misconduct for which respondent has already been found culpable in Count Nine. The court finds these two counts duplicative, and therefore assigns no additional weight to Count Ten.

d. Count 11: Section 6068, Subdivision (i) [Failure to Cooperate]

By failing to respond to the State Bar investigator's August 4, 2010 email and voicemail, and August 16, 2010 letter of inquiry, respondent failed to cooperate and participate in a disciplinary investigation pending against him, in willful violation of section 6068, subdivision (i).

III. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factors were submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁹ Respondent, however, has no prior record of discipline in 15 years of practice prior to engaging in his first act of misconduct in the current proceeding.¹⁰ Practicing law for 15 years before committing misconduct is entitled to some weight in mitigation.

B. Aggravation

Respondent was found culpable of eleven acts of misconduct. Multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

IV. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. In this case, the standards call for, at a minimum, a period of suspension of 90 days. (Standard 2.2(b).)

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) The

⁹ All further references to standard(s) are to this source.

¹⁰ Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of respondent’s membership records.

standards are not mandatory; they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar has requested, among other things, that respondent be actually suspended for 90 days. The court agrees with this recommendation. In reaching this conclusion, the court finds *In the Matter of Greenwood* (1998) 3 Cal. State Bar Ct. Rptr. 831, to be particularly instructive.

In *Greenwood*, the attorney was found culpable of misconduct in two matters. In the first matter, the attorney failed to perform, improperly withdrew from representation, and failed to cooperate with a State Bar investigation. In the second matter, the attorney failed to perform, failed to communicate, violated a court order, failed to return a client's file, and failed to cooperate in a State Bar investigation. In aggravation, the attorney caused both of his clients' lawsuits to be dismissed. No mitigating circumstances were found.¹¹ The Review Department recommended that the attorney be suspended for 18 months, that execution of that suspension be stayed, and that he be placed on probation for 2 years, on the condition that he be actually suspended for 90 days.

Greenwood and the present matter share many similarities. While respondent's lack of a prior record of discipline warrants additional mitigation, this fact is counterbalanced by his misrepresentation in the Lawrence matter and his failure to participate in the present proceedings. Accordingly, the court sees little reason to deviate from the level of discipline recommended in *Greenwood* and standard 2.2(b).

¹¹ The attorney had no prior record of discipline, however, his six years of practice prior to the beginning of his misconduct did not warrant mitigation.

V. Recommended Discipline

Accordingly, the court recommends that respondent **David Franklin Brown** be suspended from the practice of law for two years, that execution of the suspension be stayed, and that respondent be actually suspended from the practice of law for 90 days and until:

(1) The court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California; and

(2) He makes restitution to Douglas Lawrence in the amount of \$2,500 plus 10% interest per annum from November 12, 2009 (or to the Client Security Fund to the extent of any payment from the fund to Douglas Lawrence, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation.¹²

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See Rules Proc. of State Bar, rules 5.400-5.411.)

It is also recommended that respondent be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

The court further recommends that respondent be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule

¹² Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.¹³

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners and provide proof of passage to the Office of Probation, within one year after the effective date of the discipline herein or during the period of his actual suspension, whichever is longer.

VI. Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: July _____, 2011

PAT McELROY
Judge of the State Bar Court

¹³ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)